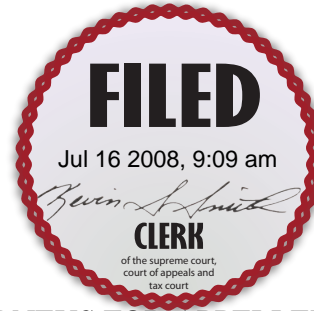


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTONIO JONES,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 45A03-0711-PC-511

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION

The Honorable Natalie Bokota, Judge
The Honorable Thomas P. Stefaniak, Jr.
Cause No. 45G04-0602-PC-2

July 16, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Antonio Jones (Jones), *pro se*, appeals the denial of his petition for post-conviction relief following his convictions and sentence for four counts of felony murder, Ind. Code § 35-42-1-1.

We affirm.

ISSUE

Jones presents a single issue on appeal, which we restate as: Whether the post-conviction court erred in determining that Jones' trial counsel was not ineffective.

FACTS AND PROCEDURAL HISTORY

We take the following facts from our opinion in Jones' direct appeal. *Jones v. State*, No. 45A03-0407-CR-339 (Ind. Ct. App. June 30, 2005).¹ On January 16, 2004, Jones received a phone call informing him that Anthony McClendon, Sr. (McClendon), was in possession of large amounts of cocaine and \$6000. Jones, Lenzo Aaron (Aaron), and James Parks (Parks) went to McClendon's apartment in Gary, Indiana, intending to rob him. In the apartment were McClendon, Jimmie Jones, Laurice Jones, and McClendon's son, 23-month-old A.M. Jones knocked at the door, and when the door was opened, Jones rushed into the apartment and started shooting. He then went in the back behind a curtain, where he fired more shots. Later, it was determined that McClendon, Jimmie Jones, and Laurice Jones died

¹ Jones correctly notes that the majority opinion on direct appeal included certain factual misstatements. We strive to avoid making such mistakes, but, as the post-conviction court observed, Jones "presents no argument to explain how these factual misstatements prejudiced him." (Appellant's Br. p. 19).

in the apartment. The scene was discovered by Ronyale Hearne, A.M.'s mother, who arrived shortly after midnight on January 17, 2004, to pick up her son. At that time, A.M. was still alive, but he later died at the hospital from multiple gunshot wounds.

Some days after the quadruple homicide, Parks told his brother, Jeffrey Lewis (Lewis), what had happened. Thereafter, Lewis informed the police, which led to the arrest of Jones. On January 29, 2004, the State charged Jones with four counts of felony murder, I.C. § 35-42-1-1. A jury trial began on May 17, 2004. The jury convicted Jones on all counts, and the trial court sentenced Jones to consecutive sixty-year terms on each count, resulting in an aggregate sentence of 240 years. On June 30, 2005, we issued a memorandum decision affirming Jones' convictions and sentence. Jones' appellate counsel filed a petition to transfer with our supreme court, which was denied. On February 14, 2006, Jones filed a petition for post-conviction relief. On September 17, 2007, the post-conviction court issued an order denying relief.

Jones now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Jones argues that the post-conviction court erred in denying his petition for post-conviction relief. Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). Under the rules of post-conviction relief, the petitioner must establish the

grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Johnson v. State*, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*.

Aside from some of the claims discussed in Section IV of this opinion, all of Jones' claims on appeal allege that his trial counsel was ineffective. The standard by which we review claims of ineffective assistance of counsel is well-established. In order to prevail on such a claim, the defendant must show (1) that his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson*, 832 N.E.2d at 996.

Because Jones is appealing from the denial of relief, he must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Id.* at 991. We do not defer to the post-conviction court's legal conclusions, but do accept its factual findings unless they are clearly erroneous. *Id.* at 992.

I. *Failure to Object to Final Instruction 15*

Jones first contends that the post-conviction court erred in determining that Jones' trial counsel was not ineffective for failing to object to Final Instruction 15, which provided:

A witness makes a prior inconsistent statement when the testimony at this trial differs from a statement made on a different occasion. Prior inconsistent statements may be used by you for two purposes. You may consider the fact that a witness made a prior inconsistent statement as showing that the person is not a truthful person. You may also consider a prior inconsistent statement as evidence in determining the guilt or non guilt [sic] of the defendant.

(Appellant’s Post-Conviction App. p. 78). The State does not dispute that the last sentence of the instruction is an overbroad statement of the law. It allows the jury to consider *any* prior inconsistent statement as substantive evidence. But in Indiana, prior inconsistent statements are only admissible as substantive evidence when certain conditions are met. Specifically, in *Modesitt v. State*, 578 N.E.2d 649, 653-54 (Ind. 1991), our supreme court held that a prior inconsistent statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross-examination *and* the statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.² Jones asserts that his trial counsel’s failure to object to Final Instruction 15, in light of *Modesitt*, amounted to deficient performance. The State does not argue otherwise. However, as the trial court noted, an instructional error does not warrant reversal unless the defendant affirmatively shows that the error prejudiced his substantial rights. *Exum v. State*, 812 N.E.2d 204, 209 (Ind. Ct. App. 2004), *trans. denied*. Jones has not made such a showing.

Jones maintains that he was prejudiced by his trial counsel’s failure to object because Final Instruction 15 allowed the jury to consider an unsworn, prior inconsistent statement of witness Albert Hart (Hart) as substantive evidence. At trial, the prosecutor asked Hart whether he remembered telling Donte Mills and Tameika Hearne (Hearne) that Jones had told him, “I got to take this n*****’s money or his life.” (Trial Transcript p. 1490). Hart testified that he did not recall making that statement. However, the prosecutor then asked

² Our supreme court has since codified this principle in Indiana Rule of Evidence 801(d)(1)(A).

Hearne whether Hart had told her that Jones “said something about taking a guy’s life or his money.” (Trial Tr. p. 1510). Hearne testified that Hart had indeed said that. Because Hart’s prior inconsistent statement was unsworn, it was not admissible as substantive evidence under *Modesitt*, but Final Instruction 15 wrongly suggested otherwise. Still, we cannot say that Jones’ trial counsel’s failure to object prejudiced his substantial rights.

Most importantly, as soon as Hearne testified as to Hart’s out-of-court statement, the trial court admonished the jury as follows: “That evidence is being offered by the State of Indiana for impeachment purposes only of [Hart]. Ladies and gentlemen, you’re to consider that evidence as impeachment only and not as substantive evidence in making your decision.” (Trial Tr. p. 1511). A jury is presumed to follow a court’s admonishment. *Lockhart v. State*, 671 N.E.2d 893, 902 (Ind. Ct. App. 1996). Furthermore, during closing arguments, neither the State nor Jones’ trial counsel referenced Hart’s prior inconsistent statement as substantive evidence of Jones’ guilt. Given these facts, the post-conviction court did not err in determining that Jones was not unconstitutionally prejudiced by his trial counsel’s failure to object to Final Instruction 15.

II. *Failure to Impeach Aaron Using His Juvenile Record*³

Jones’ next argument is that the post-conviction court erred in determining that his trial counsel was not ineffective for failing to investigate and use Aaron’s juvenile record to

³ Jones also briefly suggests, in a footnote, that his trial counsel should have sought to show that Aaron was biased against Jones because Jones had testified against Aaron’s cousin in a different case. Jones has not developed this argument, and we will not do so for him.

impeach his testimony. The only record Jones presented to the post-conviction court was a 1996 arrest report showing that Aaron had turned himself in to the Gary Police Department on suspicion of attempted murder after learning that Roosevelt Pickett (Pickett), McClendon's brother, reported that Aaron had shot him. Jones argues that this report would have shown that Aaron knew McClendon and his family, had a violent past with the family, and was capable of harming another person. There are at least two major problems with Jones' argument.

First, the arrest report, standing alone, is not proof that Aaron shot at Pickett. Jones presented no evidence to the post-conviction court that Aaron was charged with, let alone convicted of, attempted murder. Second, and in the same vein, Jones failed to show how the arrest report would have been admitted at trial. According to Indiana Evidence Rule 609, only convictions may be admitted for purposes of attacking the credibility of a witness. Absent a stronger showing by Jones, we conclude that the post-conviction court did not err in determining that Jones' trial counsel was not ineffective for failing to investigate Aaron's juvenile record and to obtain the arrest report in order to impeach Aaron's testimony.

III. Impeachment of Roosevelt Pickett

Next, Jones makes a dubious claim that his trial counsel was ineffective for failing to impeach Pickett with a statement he allegedly gave to police suggesting that someone other than Jones—a person named “Smurf”—was out to kill McClendon. (Appellant's Br. pp. 11-12). However, Jones presented no evidence to the post-conviction court showing that Pickett in fact made such a statement, such as the testimony of the officer to whom the statement was

allegedly given. We concur with the post-conviction court that “[t]rial counsel cannot be deemed ineffective for failing to impeach Pickett with a statement of which there is no evidence.” (Appellant’s Br. p. 18). Furthermore, even if we assume that trial counsel performed deficiently by not identifying and obtaining such a statement, Jones has made no argument whatsoever explaining how he was prejudiced by such an omission. Therefore, the post-conviction court did not err in determining that Jones’ trial counsel was not ineffective in this respect.

IV. Request for Remand

Finally, Jones asks that we remand this cause to the post-conviction court so that he can have the opportunity to present: (1) the testimony of the officer to whom Pickett allegedly made a statement claiming that “Smurf” was out to kill McClendon; (2) certified phone records proving his innocence; (3) evidence supporting his claim that a juror was a retired fireman and a key witness for the State was the son of a fireman; (4) evidence showing that he had money on the night of the killings (and therefore did not need to rob anybody); (5) evidence to support his claim that pretrial statements of certain jurors revealed bias against him; and (6) testimony from his appellate counsel as to why he failed to file a petition for rehearing with this court after we affirmed his convictions and sentence. Jones presented all of these claims to the post-conviction court, which rejected all of them because they were either unsupported by any evidence or omitted from Jones’ proposed findings of

fact and conclusions of law. Jones has presented no compelling justification for us give him a second bite at the apple.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err in denying Jones' petition for post-conviction relief, and we deny his request to remand this cause for further proceedings.

Affirmed.

BAKER, C.J., and ROBB, J., concur.